



## California Council for Environmental and Economic Balance

101 Mission Street, Suite 1440, San Francisco, California 94105  
415-512-7890 phone, 415-512-7897 fax, [www.cceeb.org](http://www.cceeb.org)

September 18, 2017

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814  
Via Electronic Submission: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



### Re: Comments Regarding the Draft Statewide Dredged or Fill Procedures

Dear Ms. Townsend,

On behalf of the members of the California Council for Environmental and Economic Balance (CCEEB), we appreciate the opportunity to offer the following comments regarding the State Water Resources Control Board's (SWRCB) draft Statewide Dredged or Fill Procedures for incorporation as amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan ("Draft Procedures"). Additionally, we appreciate your consideration of our request to extend the comment period and provide additional time for stakeholders to review and develop comments on the Draft Procedures.

CCEEB is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

We applaud the SWRCB and staff in its efforts to more closely align the Draft Procedures to the federal requirements and to provide statewide consistency as they apply to waters of the state (WOTS). We understand that these efforts extend beyond the Draft Procedures to include the issuance of General Orders for the recent 2017 Nationwide Permits (NWP) and specifically the expansion of the Certification of NWP 12 – Utility Line Activities. We request that clarifying language be added to indicate that projects covered by General Orders are excluded from these Draft Procedures.

After thorough review of the Draft Procedures, CCEEB has identified a number of concerns that may create a significant burden on the regulated public seeking to maintain regulatory compliance. The approach contemplated in the current Draft Procedures creates a broad program with significant implementation implications (e.g., permitting delays, economic impacts, inconsistency between Regions).

As you and the Board know, CCEEB and its members always endeavor to provide substantive feedback to help balance economic and environmental considerations, avoiding detrimental effects on the economy and positively inform potential revisions to

various efforts undertaken by the SWRCB. In this regard, we have divided our comments into general comments and specific comments with proposed language revisions for your consideration.

## **GENERAL COMMENTS**

CCEEB appreciates the SWRCB's interest in providing consistency across the state and improving protections for WOTS not covered by the Clean Water Act (CWA). However, we are concerned about the broad nature of the Draft Procedures that would encompass all impacts to WOTS. Further, the Draft Procedures are in some cases not aligned with the U.S. Army Corps of Engineers' (USACE or Corps) 404 CWA program. These concerns, we believe, will result in significant burden on the regulated entities subject to these procedures that outweigh any benefit from standardization that may be realized. Additionally, a number of the provisions are vague, inconsistent and even present conflicts that will impact the Draft Procedures' implementation and are expected to result in inconsistent application by Regional Boards.

### **Project Objectives Are Not Achieved**

As described in the Staff Report in Section 6.1, the Draft Procedures include seven specific objectives. Unfortunately, three of the seven objectives clearly would not be fulfilled through implementation of the Draft Procedures:

- Objective 3 - Consistency with the federal CWA Section 404 program. While attempts were made to align with the USACE program, the approach described in the Draft Procedures does not fully meet this objective.
- Objective 5 - Improve consistency across all Water Boards. The "case-by-case" subjectivity allowed in the processing of permit applications eliminates the consistency the SWRCB is focused on institutionalizing across Regional Boards. While we appreciate the need for regional discretion, the Draft Procedures create significant regulatory uncertainty for prospective applicants.
- Objective 6 - Streamline the 401 Certification process. The Draft Procedures establish additional requirements that burden projects and unnecessarily complicate the permitting process.

The Draft Procedures attempt to standardize the process; however, they include a set of requirements that are more onerous than most projects require. We strongly recommend that additional consideration be given to creating an off-ramp for low risk/minimally impactful projects such as minor maintenance operations. Given the extensive Water Board staff workload, this approach ensures that staff time is focused on those projects that truly require additional analyses and more comprehensive permitting.

### **Level of Staff Discretion May Cause Significant Uncertainty and Inconsistency**

We applaud the SWRCB's efforts to streamline the permitting process, however, the "case-by-case" subjectivity will not drive consistency among the Water Boards and instead is likely to create substantial variation in permit processing decisions between Regional Boards, as well as among staff within a Regional Board. While it may be understandable that the individual Boards be given some discretion on when to apply

specific conditions, the language however includes no guidance on when or how to apply these. This open language is likely to result in inconsistencies on how these are applied and could create substantial uncertainty for the regulated community. It is critical that additional, condition-specific language be added to better define what circumstances trigger the need for additional permit application information.

### **Project Impact Tiering Thresholds**

We appreciate that General Orders have been excluded from having to comply with the Draft Procedures. However, the impact thresholds of the Draft Procedures do not align with the USACE NWP program and should be adjusted to closer align (see specific comment 2 below).

### **Procedures May Impede other SWRCB Projects and Objectives**

Under the Procedures, a new permitting program will be established that entail new application procedures, substantive standards and mitigation requirements that apply to all wetland and non-wetland WOTS. As structured, CCEEB is concerned they may result in problematic overlap, conflict and delay with other SWRCB priority projects and objectives.

As you know, CCEEB has been deeply engaged in the SWRCB Strategy to Optimize Resource Management of Stormwater (STORMS) as well as the discussions regarding the development of alternative compliance options under the Industrial General Permit (IGP) as staff works to incorporate the TMDL provisions. As we consider the paths forward to promote capture and use of stormwater, CCEEB notes that there are a number of hurdles including time and funding. As we work with stakeholders on a host of pilot projects to capture and use stormwater, we question what impact these new Procedures may have on the STORMS projects when the definition of “wetland” is expanded such that areas that may not have otherwise been considered in scope for these Procedures now will be in scope and result in further added costs and time for permitting when the projects are already struggling with time and funding constraints to begin with. Additionally, under the IGP a watershed based approach as an alternative compliance option is in the works. CCEEB strongly supports such an option; however, these Procedures raise questions about how potential watershed projects may be impacted. As an example, some permittees may work within their regions on a watershed based approach that utilizes constructed wetlands to help address TMDL related contaminants. To the extent that these Procedures move forward as drafted, CCEEB shares the concern of other stakeholders regarding the new permitting requirements and operations and maintenance (O&M) requirements that would be negatively impacted as a result of the expanded definition of wetlands.

## **SPECIFIC COMMENTS**

### **Comment 1. – II. Wetland Definition (lines 30-62)**

The intent of the Draft Procedures to provide regulatory coverage over those wetland sites potentially not regulated under federal jurisdiction resulted in an unnecessary new definition of wetlands. The new definition will lead to regulatory uncertainty without providing any meaningful added protection of aquatic resources. Utilizing the Corps’ existing definition of wetlands is both sufficient to provide coverage for wetlands outside

of federal regulation and practical. Lack of Federal control over such wetlands is a result of case law requiring connectivity to navigable waters, not due to an insufficient definition of wetland. A modified wetland definition would require a new delineation manual or supplement to the manual. Additional aquatic resources that the SWRCB desires to provide coverage for should simply be captured as WOTS, or may already be covered as other “special aquatic sites” (i.e. mud flats).

Comment 2. – **IV.A. Project Application Submittal**

**Completeness Review (lines 104-113)**

The Draft Procedures add an additional 30-day timeframe for deeming an application complete. In total, the proposed regulations could result in a 60-day timeframe for deeming an application complete, with little incentive for Water Board staff to deem an application complete at the first 30-day window. The Draft Procedures should include language that requires the permitting entity to be specific with their requests for more information within the initial 30 day period in order to avoid additional project delays. Specific Requirements should be developed and incorporated into the Draft Procedures in order to identify which projects would be required to submit each additional information item identified in subsection 2.

Recommended Edits:

*Applicants must submit the items listed in subsection 1 to the permitting authority. In addition, applicants shall consult with the permitting authority about the items listed in subsection 2. Within 30 days of receiving the items listed in subsection 1, the permitting authority **must indicate in writing to may require** the applicant to submit ~~one or more of~~ the **required** items in subsection 2 for a complete application. Within 30 days of receiving all of the required items (**i.e. a total of 60 days of permitting authority review**), the permitting authority shall determine whether the application is complete and notify the applicant accordingly. **If no request is provided by the permitting agency within the designated timeframes, the application shall be deemed complete.***

Comment 3. – **Items Required for a Complete Application (Lines 114-181)**

The Staff Report states that the lists of items were generated by querying what various agency staff currently require and compiling these items into a master list. However, some of these items are not readily available for submittal as indicated below:

- **Jurisdictional Determination (line 117)**

Subsection 1(b) indicates that if waters of the U.S are present, a delineation report and either a preliminary of approved jurisdictional determination issued by the Corps is required for a complete application. This requirement does not take into account instances where the Corps does not make a determination on jurisdiction such as non-notifying NWP.

Requests for Jurisdictional Determinations are often made concurrent with permit application submittal. Additionally, the inclusion of a final decision document issued by the Corps which determines on-site jurisdiction is inconsistent with guidance issued by the Corps in Regulatory Guidance Letter (RGL) 16-01. Due to the

inconsistencies identified here, this item should not be identified as a requirement for a complete application in subsection 1.

Recommended Edits:

*b. If waters of the U.S. are present, a final aquatic resource delineation report, **with and** a preliminary or approved jurisdictional determination issued by the Corps **if available**.*

- Alternative Analysis (Line 141-155)

Under Subsection 1(g), the Draft Procedures indicate that an alternatives analysis is required as a part of a complete application unless the listed exemptions apply. If no exemptions apply, an alternatives analysis consistent with requirements in 230.10 would be required. The State Supplemental Dredge or Fill Guidelines are consistent with the EPA guidelines of the same numbering system at 40 CFR 230.10(a). Notably excluded from the State Guidelines is 40 CFR 230.7 which describes the conditions for issuance and evaluation process of General permits. Within this section, at 40 CFR 230.7(b)(1), it states that "...consideration of alternatives in § 230.10(a) are not directly applicable to General permits".

It is recommended that in order to achieve consistency with the Corps permitting process, and to not place an additional unnecessary burden on the applicant, that an exemption from the alternatives analysis requirements under Subsection 1(h) be included for all projects meeting the terms and conditions of any General permit issued by the Corps. This would include all Nationwide Permits, Regional General Permits, or Programmatic General Permits. A statement from the applicant of the steps taken to avoid or minimize impacts to jurisdictional waters, as described in your "Tier 1 projects" should be sufficient for all projects of this nature.

The SWRCB should consider adding an additional exemption for CEQA-exempt projects (i.e., if a project is exempt from CEQA, it would also be exempt from the alternatives analysis requirement).

Recommended Edits:

*An alternatives analysis, unless any of the following exemptions apply.*

*i. The project includes discharges to waters of the state ~~outside of federal jurisdiction,~~ but the project would meet the terms and conditions of one or more ~~Water Board certified~~ Corps' General Permits, ~~if all discharges were to waters of the U.S.~~ The permitting authority will verify that the project would meet the terms and conditions of the Corps' General Permit(s) if all discharges were to waters of the U.S. based on information supplied by the applicant.*

- Impact Thresholds Tiering (Lines 166-181)

Impact thresholds under Tiers 1, 2 and 3 do not align with the USACE Program for the Alternative Analysis requirements. Recommend modifying impact thresholds to be equivalent. Also, headwater creeks are very common and of lower functional value and should not be regulated at the same level as wetlands. Thresholds should also be tied to the permanent loss of impacts which incentivizes Permittees to perform avoidance and minimization and is also in line with the USACE Program.

Recommended Edits:

i. Tier 3 projects include any project that directly **permanently** impacts more than ~~half two-tenths (0.2)~~ **(0.5)** of an acre or ~~300~~ **500** linear feet of waters of the state, or directly **permanently** impacts a ~~special aquatic site, bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species~~; and is not a project that inherently cannot be located at an alternate location. Tier 3 projects shall provide an analysis of off-site and on-site alternatives.

ii. Tier 2 projects include any project that directly **permanently** impacts more than ~~one three tenths (0.1)~~ **(0.3)** and less than or equal to ~~half two-tenths (0.2)~~ **(0.5)** of an acre or more than ~~400~~ **300** and less than or equal to ~~300~~ **500** linear feet of waters of the state, or any project that inherently cannot be located at an alternate location (unless it meets the size requirements set forth in Tier 1). Tier 2 projects shall provide an analysis of only on-site alternatives.

iii. Tier 1 projects include any project that directly **permanently** impacts less than or equal to ~~one three tenths (0.1)~~ **(0.3)** of an acre or less than or equal to ~~400~~ **300** linear feet of waters of the state, unless it is a Tier 3 project because it impacts a specified habitat type. Tier 1 projects shall provide a description of any steps that have been or will be taken to avoid and minimize loss of, or significant adverse impacts to, beneficial uses of waters of the state.

Comment 4. – **Additional Information for Complete Application (Lines 182-249)**

Subsection 2 includes additional items that may be difficult and costly to address, as described below. Most importantly, there is no threshold or criteria as to when the subsection 2 items would be required and this would likely lead to significant inconsistencies from Region to Region and individual staff. The Draft Procedures propose a menu for staff to choose from, as opposed to developing specific guidance for impacts or aquatic resource types that may require additional information for analysis. For each of the items in this section, we suggest specific triggers or thresholds be developed based on the level of project impacts or the type of water impacted (i.e., as in items 2[d],[e],[f]).

- **Wet Season Delineation (Lines 183-185)**

Subsection 2(a) indicates that if a wetland delineation was completed in the dry season, supplemental field data from the wet season could be required. This is not only potentially costly and could result in significant delays to projects, but it is unnecessary and contradictory to other requirements listed in Subsection 1 (i.e., Final aquatic resources delineation report). Corps' 1987 Wetland Delineation Manual and Regional Supplements have been developed to facilitate year-round delineations, including problematic and atypical situations. Hydric soil conditions and indicators persist once established and can be identified at any time of year. Additionally, it is unclear whether the permitting authority would require a wet-season delineation if a Corps' approved or preliminary jurisdictional determination was already issued (as required per Subsection 1(b)). This item should be deleted absent the SWRCB establishing a separate jurisdictional delineation approval process. Alternatively, the permitting authority should provide guidance to

Permittees as to which aquatic resources or situations may warrant a wet-season delineation in order to avoid significant seasonal delays.

- Climate Change (Lines 186-188)

It is unclear how the Permittee would assess the impacts associated with climate change related to a project as required by Subsection 2(b). Impacts associated with climate change should be addressed under a project's CEQA document, if applicable. Requiring a separate analysis specifically under a 401 Certification or Waste Discharge Requirement seems misplaced and would likely result in a significant financial burden on the regulated public. Guidance should be provided regarding what is required to be submitted in this analysis and when it would apply.

- Watershed Profile (Lines 201-202)

Subsection 2(c)(i) The information necessary to create a watershed profile for a project and any associated proposed compensatory mitigation is not readily available to applicants for all locations and would be difficult and costly to obtain. Additionally, no description of the watershed size to be evaluated for this watershed profile is identified, adding another layer of uncertainty for the potential applicant. Instead of requiring additional analysis at the landscape level, the SWRCB should align with the Corps 2008 Mitigation Rule (33 CFR Part 332) and preference for siting mitigation on a watershed-based approach. We recommend that watershed profiles only be required should a permanent impact threshold of greater than 0.5 acre be reached and that further clarity on the watershed size be provided.

Recommended Edits:

~~*i. — A watershed profile for the project evaluation area for both the proposed dredged or fill project and the proposed compensatory mitigation project.*~~

*ii. A description of how the project impacts and compensatory mitigation would not cause a net loss of the overall abundance, diversity, and condition of aquatic resources, ~~based on the watershed profile~~. If the compensatory mitigation is located in the same watershed as the project, no net loss will be determined on a watershed basis. If the compensatory mitigation and project impacts are located in multiple watersheds, no net loss will be determined considering all affected watersheds. The level of detail in the **conceptual** plan shall be sufficient to accurately evaluate whether compensatory mitigation offsets the adverse impacts attributed to a project.*

Comment 5. – **IV.B.3 Alternative Analysis**

As mentioned above in Comment 2 (section IV.A.1(g)(i)), the SWRCB should remove the pre-certification requirement associated with the NWP exemption. Projects meeting the terms and conditions of any General permit issued by the Corps should not be required to submit an alternatives analysis.

The intent of the NWP Program is to provide “timely authorizations for the regulated public while protecting the Nation’s aquatic resources” for activities which will result in “no more than minimal individual and cumulative adverse environmental effects.” Each

NWP goes through an alternatives analysis under NEPA and is consistent with the 404(b)(1) Guidelines as part of the issuance process. As such, there is no need to conduct an extensive alternatives analysis on projects that qualify under this program, regardless of the Certification status. This requirement within the Draft Procedures would subject minor activities such as routine maintenance of existing facilities to additional unnecessary review.

We recognize that the SWRCB's intent for the Draft Procedures is to align with the USACE's 404(b)(1) Guidelines, but there are two important concerns with the implementation of this approach. The Comparison of the 404(b)(1) Guidelines to the State Supplemental Dredged or Fill Guidelines strikes out all the language pertaining to the USACE's approach to alternatives analysis and thus, the procedures do not provide any documentation confirming how the alternatives analysis will be conducted. Given Water Board staff workload, and lack of experience in reviewing alternatives analyses for practicability in terms of cost, logistics, and existing technology, significant delays to project review time would occur. Staff would need considerable training in order to become proficient in this task. If alternatives analyses were only required for projects that did not comply with a Corps issued General permit, (i.e., Individual Permit), this would ensure that staff time would be focused on those projects that truly require additional analyses and more comprehensive permitting.

Comment 6. – **C. General Orders**

Section C of the Draft Procedures states that the Water Boards may adopt General Orders for specific types or classes of activities that require similar conditions or limitations to minimize adverse impacts and are more appropriately regulated by general order. While this is arguably a helpful approach, another possibility would be to more clearly recognize the USACE's NWPs and provide streamlined processing for activities that qualify for these permits. They are categories of discreet activities with minimal impacts. A concern with this approach is that it would create inconsistencies among the Regional Boards in terms of how certain types of activities are regulated.

Comment 7. – **Exemptions**

While we do not believe it is the SWRCB or staff's intent to negatively impact these other SWRCB projects and objectives, we are concerned that these Procedures as currently structured will negatively impact those other SWRCB priorities. In this regard, we propose the following changes to help alleviate these concerns and the overlaps and conflict that may arise:

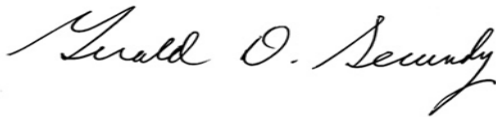
- Eliminate artificial wetlands that are a result of historic human activity and that have become relatively permanent parts of the natural landscape from the applicability of the Procedures. More specifically, the Procedures need to be revised to retain the exemptions in full consistent with those recognized under federal law and to provide the regulated public with a clear understanding of what features are in scope under the Procedures.
- Add exclusions for industrial features and activities associated with maintenance of facilities covered by other existing Orders. This will help avoid overlap and the potential for inconsistency.
- Specifically exclude active remediation sites that are currently under Water Board control and oversight.



- Specifically exclude all multi-benefit facilities such as constructed water quality treatment and supply facilities and the O&M required to maintain them
- Specifically exclude water supply facilities, including groundwater recharge ponds and conveyance infrastructure. CCEEB is concerned failure to provide such an exemption will result in conflicts and challenges with complying with the Sustainable Groundwater Management Act (SGMA) and its groundwater sub-basin objectives.

Thank you for the opportunity to comment and for your consideration of our concerns and recommended revisions. CCEEB looks forward to working with the SWRCB and staff to develop Procedures that are workable, consistently applied across jurisdictions, and protective of the environment. Should you have questions, please contact CCEEB's Water, Chemistry and Waste Project Manager Dawn Koepke with McHugh, Koepke & Associates at (916) 930-1993. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Gerald D. Secundy".

Gerald D. Secundy  
CCEEB President

cc: The Honorable Felicia Marcus, Chair, SWRCB  
The Honorable Steven Moore, Vice Chair, SWRCB  
The Honorable Tam Doduc, SWRCB  
The Honorable Dorene D'Adamo, SWRCB  
The Honorable Joaquin Esquivel, SWRCB  
Phillip Crader, SWRCB  
CCEEB WCW Project Members  
The Gualco Group, Inc.